United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1079

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P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-1079

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

JOSEPH F. VALVERDE III,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

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BRIEF FOR DEFENDANT-APPELLANT

Preliminary Statement

The defendant JOSEPH F. VALVERDE III appeals from a judgment of the United States District Court for the Southern District of New York (Griesa, J.) entered upon a jury verdict convicting him of one count of violating 21 U.S.C. 846 and two counts charging violations of 21 U.S.C. 812, 841[a][1], 841[b][1][A], 18 U.S.C. 2 and sentencing him to the custody of the Attorney General or his duly authorized representative for a period of four years on each count followed by a special parole of three years, all sentences imposed to run concurrently.

The indictment, docketed below as 75 CR 745, charged appellant VALVERDE and his non-appealing co-defendant SAMUEL GLASSER with violating 21 U.S.C. 846 (Count One) by entering into a conspiracy commencing on January 1, 1973 to distribute cocaine; 21 U.S.C. 812, 841[a][1], 841[b][1][A]; 18 U.S.C. 2 (Count Two) by actually distribtuing cocaine during July or August 1974; 21 U.S.C. 812, 841[a][1], 841[b][1][A], 18 U.S.C. 2 (Count Three) by distributing cocaine during November or December 1974; and 21 U.S.C. 812, 841[a][1], 841[b][1][A], 21 U.S.C. 2 (Count Seven) by

possessing and distributing cocaine on or about February 6, 1975.

The indictment appears on page 4 of Appellant's Appendix.

STATEMENT OF FACTS

THE MOTION TO SUPPRESS

On February 14, 1975, SAMUEL M. GLASSER, an attorney and graduate of the University of Pennsylvania Law School, was arrested inside apartment 5-D at 205 East 63 Street, Manhattan [5]* The apartment was rented by the defendant JOSEPH VALVERDE [5].

On that day, EUGENE PIPER arrived at apartment 5-D at 11:00 a.m. and stayed until about 12:15 p.m. [6]. During this initial visit, GLASSER and PIPER discussed a short story that Piper, a struggling writer, had written [36]. Piper claimed that the purpose of his visit was to obtain cocaine for purposes of transfer to another person [185].

Following these discussions, the trio adjourned to Allen's seafood restaurant for lunch [38-39]. They did not complete the luncheon until about 2:15 p.m. at which time VALVERDE and GLASSER returned to VALVERDE'S apartment and PIPER went in a separate direction [41]. PIPER was going to deliver the cocaine [186].

Both during this initial visit to apartment 5-D and later at Allen's Restaurant, telephone calls were placed by PIPER in furtherance of the planned cocaine transfer [185].

At about 3:15 p.m., PIPER met with STEVE GREENSTEIN and received $10,000 in payment for a previously delivered quantity of cocaine [187]. In addition, the subject of future cocaine deliveries was likewise discussed [243]. The conversation with GREENSTEIN was overheard and recorded by GRAY who, by pre-arrangement, secreted himself in GREENSTEIN'S bedroom.

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*Numerical references are to the minutes of the hearing on the motion to suppress.

At about 4:00 p.m., while being surveilled by agents GRAY and HALL [204], PIPER returned to the apartment and according to GLASSER claimed he was in the area and wanted to make some telephone calls from the apartment [42]. PIPER claimed that he returned to deliver the $10,000. While GLASSER claimed there was no real conversation between PIPER and the defendants [43], PIPER claimed that they discussed the arrival of a load in March* [188]. While GLASSER denied ever receiving the $10,000 [45], PIPER testified that he had given it to VALVERDE [188-189]. PIPER finally left the apartment in possession of a manila envelope which he believed contained one-half kilogram of cocaine [189-190]. During the elevator trip down to the lobby, PIPER was unknowingly in the company of agent JEFF HALL [190-191].

PIPER'S ARREST

PIPER was arrested in the possession of cocaine [191] at about 5:00 p.m. on February 14th while on Third Avenue near East 82 Street [146, 207] by agent HALL and another agent [147]. He told the agents of receiving drugs from VALVERDE, but not from GLASSER [153, 193]. Some ten minutes after his arrest, after discussing the possibility of cooperating with the Government while in handcuffs [177], PIPER called VALVERDE'S apartment at agent HALL'S urging [155, 177]. PIPER voiced no objection to HALL'S taping of this conversation [156]. PIPER had been told that if he cooperated, the agents would apprive the Government prosecutor of this fact and he, in turn, would notify PIPER'S sentencing judge [277].

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*The Government claimed that agent HALL overheard this conversation by placing his ear to the door of the apartment 5-D [272]. At the time agent HALL listened in the doorway at apartment 5-D for ten minutes, he claimed he was able to hear parts of the conversation going on inside [340-341]. He conceded, however, never having been familiar nor even having heard any of the defendants' voices [369]. Specifically, HALL
(FOOTNOTE CONTINUED ON FOLLOWING PAGE)

PIPER'S final visit to apartment 5-D occurred at 5:30 p.m., this time in the custody of the arresting agents [8, 157]. His final visit, according to GLASSER, was prompted by GLASSER'S invitation to PIPER to come by, have a drink, and watch the news [56].

When PIPER entered the apartment, his first words were, "I have been busted" [78-79, 158, 192]. He then explained that he had been arrested for the possession of cocaine [9].

When PIPER was pressed to explain the circumstances surrounding the arrest, he told GLASSER that he had implicated GLASSER and VALVERDE [10, 79], and that the arresting agents were in possession of tapes of telephone conversations made between PIPER and GLASSER, which PIPER claimed he was compelled to make [10, 79]. PIPER explained he could not remain for long, because the building, corridors and hallways were all covered by Federal agents who were going to come into VALVERDE'S apartment [11]. Neither GLASSER nor VALVERDE went into the bedroom or bathroom area during PIPER'S final visit [80-81].

Within ten or fifteen minutes after PIPER'S arrival, he attempted to leave the apartment [82]. While PIPER was in the process of exiting the apartment, by pre-arrangement [183], at least six agents forced their way through the opened doorway, with guns drawn [12, 100, 159]. The agents did not knock on the door, announce the fact they were agents, or claim they were in the possession of arrest or search warrants [12].

GLASSER was then handcuffed and seated on the living room couch [13]. VALVERDE and PIPER were then likewise handcuffed [14]. PIPER was asked if he knew the whereabouts of the $10,000; he did not [161]. From GLASSER'S vantage point on the living room couch, he saw the agents proceed down the apartment foyer leading towards the bedrooms

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE) claimed he overheard a discussion about the arrival of a shipment on March 10, 1975 and the quantity four grams [342]. He did not hear the actual mention of drugs or code names
(FOOTNOTE CONTINUED ON FOLLOWING PAGE)

and bathroom [14]. There was a tremendous amount of agent activity involving entrance into various rooms during the period prior to the defendants' removal from the apartment [15]. There was a constant stream of agent traffic shuffling between the living room and bedroom [163]. There was constant talk among the agents concerning the arrival of a search warrant [163-164].

At one point, one of the agents confronted GLASSER with a quantity of U.S. currency and asked GLASSER if it was his [88]. PIPER saw agent GRAY in the bedroom quickly open dresser drawers. GRAY also went to the bookcase and removed a book in an effort to uncover the $10,000. Another agent held up a hand weapon which he apparently uncovered [162]. There were at least two agents in the bedroom during most of the pre-warrant period [167].

At one point, agent GRAY observed a closed black litigation bag in the master bedroom [289]. Although his sole purpose for being out of the defendants' sight was to secure the apartment and ascertain whether any confederates were present, he admitted opening the black litigation bag [289], and finding a gun [290, 296].

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

for drugs [390]. As the conversation grew louder, indicating that the declarants were approaching the apartment doorway, HALL retreated toward the elevator [342]. He did not know if the stereo player or television were being operated at that time [374]. HALL and PIPER then road down in the elevator together [342-343].

THE SEARCH WARRANT

At the direction of Assistant United States Attorney Rudolph Giuliani, then Chief of the Southern District's narcotics bureau, at 6:30 p.m. on February 14, 1975, Assistant United States Attorney Thomas Fortuin was assigned to prepare and apply for a search warrant to search apartment 5-D [316-317]. Fortuin discussed the background facts by telephone with agent Hall [317].

Specifically, Fortuin was apprised of STEVE GREENSTEIN'S arrest and the supplying of $10,000 to him to obtain evidence against the latter's supplier, PIPER [318]. Following PIPER'S receipt of the $10,000, the agents followed PIPER back to apartment 5-D. HALL told Fortuin that he listened at the apartment door and allegedly overheard a conversation, "We'll be receiving a load. . ." either "next month" or in the early part of March [319].

PIPER left the apartment and was arrested, minutes later, in a taxi cab. He did not have possession of the money [319], but did have a half kilogram of cocaine [320].

At this point, PIPER agreed to cooperate, called apartment 5-D, spoke with GLASSER*about someone being "$1,000 short" [320].

Following Fortuin's completion of agent HALL'S affidavit in support of the search warrant for apartment 5-D, the prosecutor and agent drove to Magistrate Jacobs' apartment where, at 9:10 p.m., the Magistrate signed the warrant [322].

At HALL'S request, Fortuin accompanied the agents on the execution of the warrant [295 322].

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*On cross examination, GLASSER was asked whether he recalled being told PIPER: "Ah, I think the guy's going to be a thousand short. Is that okay? I mean he said he'd make it up to me um. It's a question of what you guys want to do..." [65-66]. GLASSER indicated he did not recall this conversation. Indeed, he was bored by PIPER'S repeated calls [66].

THE EARCH

When HALL and Fortuin arrived at the apartment, they were greeted by agent GRAY [293, 323] who had remained to safeguard apartment 5-D. During this "caretaker" stage, GRAY made up to a half dozen trips to the master bedroom [294].

Following this part of the search, the prosecutor chided the agents for their uncanny ability to locate evidence while, by comparison, he had been relatively ineffectual [330-331]. Fortuin did not question the agents relative to the execution of a pre-warrant search [330-331]. He also did not ask agent GRAY whether he had opened and emptied the black litigation bag which Fortuin had found in the bedroom closet [332]. Although Mr. Fortuin left the apartment at about 10:00 p.m. [333], the search did not terminate until clost to midnight [298].

While the young prosecutor went to the living room, agents GRAY and HALL went directly to the master bedroom [323]. Hall picked up a black litigation bag, placed in on the bed, and removed two pistols [324] and some papers which were discovered during a pre-warrant search [361]. In the meantime, GRAY had positioned himself at the bedroom bookcase where he apparently found an envelope containing $100 bills [324]. The search at the bookcase continued where GRAY found an additional $3,000 and later $2,000, which were secreted in some books [324]. At no time was Fortuin able to find any money secreted but no narcotics [299]. An electronic calculator was found, GRAY claimed, in the bag where the guns were located but after the search warrant was obtained [301]. Agent HALL recalled that guns and some documents were found in one litigation bag, empty water-coated plastic bags in another bag, and some papers and documents in the third bag [363].

FOLLOWING DAY

The day following the defendants' arrest, GLASSER and PIPER had a conversation at the then operable federal detention facility at West Street [17]. PIPER repeated the events leading up to his arrest, and how he was forced to telephone GLASSER and engage him in conversation [20, 78]. PIPER did not believe he had any other choice but to cooperate with the arresting agents [169]. He denied that he was menaced into cooperating with the agents [170].

According to PIPER, the defendants suggested a false explanation for their involvement in this cocaine transfer [197].

SOUND TEST

JOHN WORUM, a recording engineer since 1969 and a graduate of RCA Institute Advanced Electronics Course [101] and a recognized audio expert accompanied the defendants to 205 East 63 Street where a test using a uni-directional microphone was conducted to ascertain whether it was possible for a person in the hallway outside an apartment like defendant VALVERDE'S to hear conversation from within the apartment [104]. The apartment which was selected for the test was completely stripped of furniture, and, hence, was far more able to transmit sound than an apartment as well furnished as the VALVERDE apartment [105].

Sound expert WORUM stated that if one stood outside the door, it was only possible to overhear conversation emanting from the living room if the front door was open, and the declarants spoke in normal conversational tones, an eavesdropper in the corridor could not hear the words uttered [107].

The ability to hear sound, WORUM explained, depends upon the amount of sound absorbent material within a room. Rugs, drapes and furnishings of the like are large absorbers of sound [107, 132].

During cross-examination, it was brought out that none of the sound tests were conducted with people conversing at or about the apartment doorway [109]. The apartment doorway is 1-3/4" steel -- a typical apartment house door [112].

The ability to comprehend sound from within the apartment was not increased if a listener placed his naked ear on or close to the steel doorway. All that one would hear would be the hammering sound of water pipes, and building vibrations [113]. One could occasionally hear what sounded like a word, but one could not make any sense out of it [131].

THE COURT'S RULING ON THE MOTION TO SUPPRESS

On May 23, 1975, Judge Griesa ruled, in an oral opinion from the bench, and denied the defendants' motions to controvert the February 14, 1975 search warrant. The Court found the Government's testimony at the suppression hearing to be entirely credible. Save for ordering suppression of one pistol (Government exhibit 6) [21] on the basis that this was uncovered prior to the search warrant [21-22], the Court declined to suppress the balance of the evidence seized from apartment 5-D.

Specifically, Judge Griesa declined to find that any items, save the lone pistol, were seized prior to the arrival of Magistrate Jacobs' search warrant or that the warrant was issued without probable cause or on the basis of perjured testimony. In regard to the testimony of agent HALL, Judge Griesa found:

> "I have considered the testimony of the audio expert and I have also considered the direct testimony of Hall without question or without reservation." [32]

The Court likewise found that the participation of Assistant United States Attorney Fortuin did not violate 18 U.S.C. 3105 or that apartment 5-D was subjected to a search beyond the confines of the search warrant [32]. Judge Griesa believed that the seizure of all tangible evidence other than the $10,000 in "buy money" was justified under the "plain view" doctrine [32-33]. The Court stated:

> "The 'plain view doctrine' permits search and seizure of items <u>immediately recognizable</u> as evidence.
>
> "At this point I should note that I reject the contention of the defendants that there was some limitation on the search imposed by the language 'a narcotics transaction'. The warrant taken as a whole

indicates to me that there is authority to search for narcotic drug controlled substances in general, and the proceeds of narcotics transactions, in general.

"Now, it is clear that in order to search for these things it is not only permitted but is necessary to make as minute a search as the agents could possibly make. This would permit looking into cases, books, drawers and in similar places. This is exactly what the agents and what Fortuin did and, in the course of looking in books and cases, they came across the three stashes of money.

"They also came across the formula, the old Glasser passport, the chemical order forms, the plastic envelopes with the cocaine residue, and the second gun.

"All of these items would be clearly and immediately recognizable as either proceeds of narcotics transactions or narcotic drug controlled substances, or evidence necessary in narcotics cases.

"Some of these items would constitute potential instruments in a narcotics transaction. They were in plain view during the search of the case, and so forth, and were properly seized." [33-34]

THE TRIAL

STEVE GREENSTEIN testified that on February 10, 1975, he was arrested by agents GRAY and HALL [79]*subsequent to offering an undercover federal narcotics agent eight ounces of cocaine [75-78]. Following GREENSTEIN'S arrest, the agents accompanied him to his apartment at 314 East 83 Street where the apartment GREENSTEIN shared with MARTIN FREIMAN, a hairdresser, and GREENSTEIN'S partner in the cocaine business [81, 141] was located. Small quantities of narcotics were found in the apartment at that time [82]. An additional seven ounces, which were not found, were later flushed away [107]. GREENSTEIN'S supplier was EUGENE PIPER [82]. He received drugs from PIPER on about a dozen occasions [139]. At no point did PIPER tell GREENSTEIN that GLASSER was his supplier [139].

PIPER'S sale price was $1,200 an ounce [90]; payment was required as quickly as possible [90]. On January 30, 1975, PIPER travelled to GREENSTEIN'S apartment with a large quantity of cocaine which GREENSTEIN later sold [96-97].

GREENSTEIN also received a thousand grams of cocaine from his roommate during the week of February 3rd [98-99]. PIPER supplied this shipment to FREIMAN [100]. Ultimately, 500 grams were sold [104]. Tapes of recorded "consentual" conversations and transcripts of same between GREENSTEIN and PIPER were played and shown to the jury over objection by defense counsel that they were not afforded a prior opportunity to listen to the tapes and, hence, to submit counter transcripts [126-127]. Judge Griesa overruled this objection [127] and the tapes were played [128].

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*Numerical references are to the minutes of the trial.

During post-arrest conversation between GREENSTEIN and the arresting agents, the arrestee was informed that if he cooperated, this would be made known to the United States Attorney's office and the Judge to whom his case was assigned [135]. Indeed, GREENSTEIN pleaded guilty to a single conspiracy count [136] and received a 30 day prison sentence [136]. GREENSTEIN was also told that he would not be prosecuted as a consequence of any testimony he gave at the trial against VALVERDE and GLASSER [137].

EUGENE PIPER, a 27 year old apprentice carpenter [366], testified that he was defendant GLASSER'S brother-in-law [171]. His background was not the best, having been asked to withdraw as a student at Villanova University in 1965 because he had narcotics in his room [310]. During the latter part of 1973, GLASSER advised PIPER, then a model and waiter [177] that he had cocaine and desired PIPER to sell it for him* [172]. Previous to this, in 1970, GLASSER and PIPER, then a college student, had discussed cocaine and, over defense objection [174, 175], had shared it [173]. Subsequent to this conversation, PIPER was given a quantity of cocaine while in the presence of GLASSER and VALVERDE [178], who were partners in a wine importation business, Vintage Vendors [180, 181]. PIPER continued to receive cocaine from the defendants about every three months [181].

PIPER received the cocaine at his apartment from GLASSER [183]. On one occasion, when PIPER paid his alleged suppliers $3,000, VALVERDE accompanied GLASSER [184]. The usual arrangement involved GLASSER supplying the cocaine to PIPER, and subsequent to sale, GLASSER would receive payment. The purchase price from GLASSER was $1,000 per ounce, with PIPER selling it for $1,200 per ounce [187]. PIPER himself used cocaine as frequently as five or ten times a day [187].

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*This was not PIPER'S maiden venture as a seller of drugs. In 1970, he dealt in cocaine while a student at Columbia University [318]. He also later dealt while on Fire Island [318-319].

Defense attempts to impeach PIPER'S credibility based upon his appearance as a nude model in a photographic essay in VIVA magazine were not to be permitted by the trial judge. Judge Griesa did not believe that PIPER'S provocative modeling activities were relevant to PIPER'S credibility [146, 193]. The Court felt it was unfair to allow this evidence to be utilized even though all agreed that a proper resolution of PIPER'S crediblity was a central issue in this case [193-194], and that PIPER'S psychological motivation to provocatively pose in the nude was likewise significant [222]. The Court cited Rule 403 of the Federal Rules of Evidence as a basis for denying the defendant resort to the VIVA magazine photographic essay [223-224].

The examination of PIPER continued with his description of a trip, which he took in late 1973 or early 1974 to Des Moines, Iowa* to deliver a pound of cocaine for GLASSER and VALVERDE [238]. This shipment constituted a test of PIPER'S reliability and trustworthiness. On another occasion, PIPER undersold three ounces of cocaine by selling it for only $3,000, thereby unwittingly eliminating his own profit [243]. Notwithstanding this financial error, PIPER was still given $600 from GLASSER and VALVERDE [244].

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*When PIPER was told to list all his prior drug activities, he did not mention this alleged transaction [321]. Government exhibit 3502 was also inaccurate not merely because of this omission, but also because PIPER'S claim of selling a half pound of cocaine to MARTY KREIMAN in January 1974 was inaccurate [325]. PIPER was also a transferrer of Hashish and PCP ("angel dust") [342].

On August 5, 1974, PIPER received eight or ten ounces of cocaine from GLASSER and VALVERDE at the Regency Hotel [246]. These drugs were sold to STEVE GREENSTEIN, MARTY KREIMAN and TOM ZUCK for $7,200 [247].

During the latter part of 1974, PIPER picked up four ounces of cocaine from VALVERDE and VALVERDE'S office at Vintage Vendors [248].

At one point, PIPER related a story wherein GLASSER and VALVERDE were in Bolivia, South America when one of their alleged connections attempted to pass off "bad" cocaine. PIPER then related how GLASSER told him how grateful he, GLASSER, was to have an armed VALVERDE to "back him up". The defendants' motion for a mistrial based upon the use of a firearm in this connection was denied [253, 254].

On February 6, 1975, PIPER, by pre-arrangement, received about a dozen envelopes of an aggregate weight in excess of one kilo [257]. PIPER then brought the envelopes to STEVE GREENSTEIN'S apartment where the cocaine was found to weigh 1,260 grams [258]. The drugs were then divided into two half kilo packages, and PIPER took the remaining quarter kilo himself for delivery to TOM ZUCK [259], because MARTY KREIMAN felt he could sell the two half kilos by himself [258]. PIPER obtained telephone approval from GLASSER to leave the cocaine even though GREENSTEIN and KREIMAN did not have the requisite $30,000 for the kilo of cocaine [260]. PIPER returned to GREENSTEIN'S apartment on February 10, 1975 and retrieved the second half kilo [261].

PIPER then met GLASSER on February 11th at PIPER'S apartment [262].

GLASSER retrieved the second half kilo* and $2,200 which PIPER had received in partial payment from ZUCK [263]. GLASSER told him he was going to Florida and would be back at the end of the week [263].

The bulk of PIPER'S testimony then reiterated his prior testimony at the suppression hearing commencing at the point of lunch at Allen's restaurant. PIPER reiterated the events surrounding his receipt of $10,000 from GREENSTEIN, and his trip to VALVERDE'S apartment [284]. The money itself was placed on a coffee table in the apartment living room [285]. The trio sniffed cocaine, and PIPER was told that a sample of the next batch of cocaine would be arriving in March [285]. PIPER was then given a brown legal envelope which contained the half kilo which had previously been given to GREENSTEIN [286].

PIPER confirmed that the elevator trip down from apartment 5-D was unknowingly made with agent HALL [288]. He then reiterated the manner that his arrest was effectuated [288], and of his ultimate determination**to become a cooperating agent [289, 360-361]. PIPER told

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*This was the half kilo that PIPER took back from GLASSER and which was in his possession when he was arrested [264]. The re-transfer was based on GREENSTEIN'S communication of his ability to now be able to move the second half kilo [267].

**PIPER'S determination to cooperate was effected by agent HALL'S admonition not to "bullshit around" when PIPER intimated that he desired to consult counsel [289].

HALL that one of the people in the apartment was defendant VALVERDE. After telling the agent that VALVERDE was of Italian extraction, PIPER indicated that agent HALL asked PIPER if VALVERDE was a member of the "Mafia" [289]. Judge Griesa's sole response to this testimony was to order that portion of the testimony stricken [289]. The Court declined to permit a bench conference to be held [289]. Later that day, the Court heard argument from VALVERDE'S counsel but declined to order a mistrial [303-305]. Counsel then declined Judge Griesa's offer of a cautionary instruction [306].

PIPER'S final visit to the VALVERDE apartment was in the guise as a Government agent. He was directed by agent HALL to spend 10 or 15 minutes just "killing time", and then to leave [295]. PIPER told the defendants of his arrest and of the imminency of the agents entry [295]. Upon hearing this, GLASSER and VALVERDE went into the back of the apartment, into the bedroom. PIPER then twice heard the sound of a flushing toilet [296].

As PIPER got ready to leave, he detected the smell of ether, and observed plastic bags turned inside out on the apartment floor in between the bed and the bathroom [297, 338]. The agents then burst in and placed the defendants under arrest.

Subsequent to arresting the defendants, and prior to the arrival of a search warrant, PIPER observed the arresting agents engaged in a pre-warrant search. PIPER observed GRAY looking through drawers and looking through books in the bookcase [337-338].

Over defense objection, PIPER was then permitted to testify to a post-arrest conversation between PIPER and the defendants at the West Street Federal Detention facility [299-300]. During this conversation in VALVERDE'S presence, GLASSER suggested that PIPER take the

brunt of what was happening by constructing a story, or the defendants "would be in big trouble" [301].

AGENT JEFF HALL, the supervising agent on this case [449], testified at trial in much the same fashion as at the suppression hearing. He confirmed the post PIPER-GREENSTEIN surveillance of PIPER which led him, ultimately, to a physical listening with his ear at the door of VALVERDE'S apartment [434]. Agent HALL'S recollection was of hearing a reference to the arrival of a shipment or load on March 10th and a subsequent reference to four grams* [405]. HALL then related the events surrounding PIPER'S arrest [406], his determination to cooperate with the Federal agents [417], and the ultimate entry**into apartment 5-D and the defendants' arrest [421].

Agent HALL then explained the procedures which he followed in working with Assistant United States Attorney FORTUIN to obtain a search warrant for search of the apartment [422-423]. During the search pursuant to the search warrant, agent HALL located one package containing $10,000 and two other packages containing $3,000 each [426]. Empty plastic bags containing a small non-weighable cocaine residue [591] were found inside a black suitcase [426, 443]. Assistant United States Attorney FORTUIN found a chemical formula inside defendant GLASSER'S passport [428].

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*This conversation was not recorded on tape [454].

**While HALL claimed that he was able to overhear conversation from VALVERDE'S living room during PIPER'S second visit, HALL disclaimed hearing anything such as the flushing of toilets other than the stereo player during PIPER'S last visit immediately prior to the arrest [435].

Agent HALL denied, in flat contradiction to PIPER'S testimony, that he conducted a pre-warrant wearch [437-438, 376]. Agent GRAY likewise denied conducting a warrantless search in the bedroom [599, 600, 606].

During cross-examination, the agent was asked whether, during the pre-warrant period, GRAY had reported opening up the black suitcase next to the chest of drawers in the bedroom. Although VALVERDE'S trial counsel asked the question seeking a "yes or no" answer, HALL cutely utilized the question to non-responsively make the jury aware of GRAY'S finding of the previously suppressed firearm [477]. The defendant VALVERDE'S motion for a mistrial [518] was denied by the Court [520]. Ultimately, the Court determinated that the proper course was to instruct the jury to strike all references to the portion of HALL'S responses to Mr. Rothblatt's cross-examination which related to the finding of the gun [556-558].

During the post-warrant period, agents HALL and GRAY, aided by Assistant United States Attorney FORTUIN commenced the search of apartment 5-D in the master bedroom [576]. It was agent GRAY who found currency secreted among the books [576]; $2,900 was found in a French dictionary [583]; $10,000 was found in an envelope stuck inside a book entitled "Glory and Lightning" [585].

The prosecutor found an apparent chemical formula* [577], various documents and plastic envelopes were found in another black suitcase [576-577]. The Court overruled defense objections to the admissibility

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*The writing was executed by defendant VALVERDE [611].

of monies other than the pre-marked advanced $10,000 funds [589]. The Court likewise permitted admission into evidence chemical order forms, a VALVERDE passport, business partnership papers, airplane ownership and use records (all seized from the alligator attache case) [592], a $34,000 purchase agreement for an aircraft [592], an "I.O.U." in the sum of $5,000 [593].

BECKY HERNANDEZ, a secretary employed by Biscayne Chemical Laboratories in Miami, Florida, testified that on October 2, 1974 the defendants entered the premises and inquired about the availability and ultimately purchased certain chemicals and related apparatus [614]. Subsequent to this initial purchase, Ms. Hernandez had a telephone conversation with VALVERDE who unsuccessfully attempted to order some acetone [616]. On several subsequent occasions, VALVERDE and GLASSER came to Biscayne Chemical. Business records of purchases made thereat were received in evidence [618]. Among the purchased chemicals were hydrocholic acid and chemical apparatus [620], regent acetone [621], spt.ar grade [621], and "acedo cloridico" [622], as well as condensors to be utilized to condense evaporated liquids [623].

ANDREW RICE, the Director of Research for the Taylor Wine Company, was shown the seized formula (Government exhibit 23) and indicated that the primary substance referred to in step one of the formula would have to be a base in order to react with hydrochloric acid to form hydrochloric salt [629], cocaine and cocaine paste, which is an alkalaid and would be basic in nature [630].

In Dr. RICE'S opinion, based upon thirteen years of experience in the production and processing of wines, the seized formula was not descriptive of a process utilized in the treatment of wine [635]. This opinion was based upon Dr. RICE'S understanding that acetone and hydrochloric acid are not listed in the Federal Code of Regulations* as approved ingredients for the processing and production of wine [636], or to test the quality of wine [638]. The Government prosecutor then ran through the formula with Dr. RICE utilizing cocaine** rather than wine as the basic substance in order to show not merely that this formula was not used in wine production, but rather, that it was used for cocaine processing [642-651]. The formula, in Dr. RICE'S opinion could not be used to alter the taste of wine [703], or to alter the smell or color of wine [704], or to determine spoilage within the bottle [704].

Prior to commencement of defendant VALVERDE'S cross-examination, trial counsel advised the Court that because he had not acquired background or training in chemistry, he was incompetent*** to conduct the

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*The prosecutor moved for and Judge Griesa approved taking judicial notice of the appropriate section of the Code of Federal Regulations. The fact that such a section existed apparently came as a surprise to defendant VALVERDE'S trial counsel who noted:

> "[I] wonder whether we might have copies of it. Obviously those are not regulations we normally carry in our library." [637]

**Dr. RICE concededly had never tested or worked with cocaine [703].

***The defendant VALVERDE obviously did not consider himself expert or competent to conduct proper cross-examination [659]. Clearly, as Mr. Flannery suggested, the proper course would have been for trial counsel to have retained an expert to inspect the formula and educate counsel [653].

bulk of the cross-examination of Dr. RICE [652]. Notwithstanding the Government's objection [652], the Court ruled that it would permit such bifuscated cross-examination [653].

The defendant attempted to conduct cross-examination, but finally Judge Griesa halted the proceedings to permit the defendant to confer with his counsel in an effort to attempt to properly frame the questions to be posed [664]. Clearly, no attempt was made to prepare the defendant for the arduous task of cross-examination of an expert witness. Following the recess, Mr. Rothblatt resumed cross-examination [669] in an effort to develop the theme that different American wine producers follow different production methods [672-672, 685], and that the steps outlined in the formula were utilized to test for wine spoilage [699-701]. In addition, Dr. RICE established that many of the purchased chemicals from Biscayne Chemical (Government exhibit 57) were used in wine analysis [708].

At the conclusion of the Government's case, defendants moved for and were denied a judgment of acquittal [716]. The defense renewed its motion to suppress, following additional testimony from PIPER [716-719], indicative of a "tentative" pre-warrant search. The Court declined to modify its prior determination denying the defendants' motion to suppress [720-724]. The defense also argued, for the first time, that agent HALL'S pre-arrest listening with his ear physically at the door of apartment 5-D was violative to the defendants' Fourth Amendment rights and reasonable expectation of privacy. The Court declined to research the constitutional question* but, rather, held that because he did

*(FOOTNOTE ON FOLLOWING PAGE)

not wish to have to strike the testimony if it was improperly obtained, he found that the objection was waived [729-731].

THE DEFENDANT VALVERDE'S CASE

PETER OTTMAR, a vice president of operations for Sun Save, Inc. of Orange Massachusetts [734] and President and treasurer of Vintage Vintners, Inc., a distributor of Argentine wines [735], testified that defendant VALVERDE was responsible for Vintage Vintner's selection of Argentine wines [735]. In addition, because problems developed concerning wine spoilage and wine bottle cork length [744], defendant VALVERDE worked at improving the quality of the wine and eliminating the problem of exploding wine corks** [745]. Mr. OTTMAR knew that VALVERDE did laboratory work at the vineyards and assumed he continued to perform such work elsewhere [778].

The Government was permitted to cross examine OTTMAR, over objection, about whether he knew that the Sheriff of New York City attempted to execute a $4,470 judgment against Vintage Vendors and VALVERDE personally [778]. He did not know [779]. The Court denied the motion to strike this testimony [783].

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*(FOOTNOTE FROM PREVIOUS PAGE) Judge Griesa did informally reason that insofar as the physical aural surveillance followed the Government's knowledge that PIPER was then in possession of $10,000 in advance Government funds, that such physical intrusion would be proper [730].

**The corks exploded causing wine drippage which allowed the wine to drip ruining the label [745].

THE GOVERNMENT'S SUMMATION

During his closing argument, Assistant United States Attorney Sears, beyond a proper marshalling of the evidence and arguing inferences he believed should be drawn from the evidence, committed serious error.

At page 856 of the trial transcript, in a surreptitious comment upon the defendants' failure to testify, the prosecutor demanded:

> "I would like an explanation, I really would, as to what the $10,000 of prerecorded funds was doing inside [the book] The Glory and The Lightning when the agents searched the apartment pursuant to a search warrant? I would like to hear it."*

Seconds later, he became an unsworn witness for the Government when he noted:

> "And I don't think those books came from anywhere except the bookcases in the apartment." [856a]

In an obvious effort to inflame the jurors and appeal to their emotions, prosecutor Sears referred to the defendants as the "high rollers" of the drug traffic in New York City [857]. Later still, during his rebuttal summation he characterized the defendants as "large dealers on an international scale." [908]

THE COURT'S CHARGE

Although the charge was substantially a fair and fair one, the Court declined defendant VALVERDE'S request that the jury be specifically charged that admission of and conviction of criminal activity must be considered in assessing the witness' credibility [944]. The Court apparently was under the erroneous impression that its charge on the care to which an accomplice's testimony must be scrutinized [935-936] fully covered the law in this area [945-947].

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*The improper comment was reiterated during the Government's rebuttal summation [905] and augmented by the Government's improper comment on the failure to offer affirmative evidence explaining the formula [906].

THE VERDICT

The jury returned a partial verdict finding the defendants guilty of counts one, three and seven in the indictment [963].

THE SENTENCE

On January 27, 1976, Judge Griesa sentenced appellant to a term of four years' imprisonment followed by three years of special parole on each count tc run concurrently on all three counts upon which guilty verdicts were rendered.

STATUTES INVOLVED

Title 18, United States Code, Section 2

Title 18, United States Code, Section 3105

Title 21, United States Code, Section 812

Title 21, United States Code, Section 841[a][1]

Title 21, United States Code, Section 841[b][1][A]

Title 21, United States Code, Section 846

RULES INVOLVED

Rule 12 of the Federal Rules of Criminal Procedure

Rule 41 of the Federal Rules of Criminal Procedure

Rule 401 of the Federal Rules of Evidence

Rule 403 of the Federal Rules of Evidence

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution.

QUESTIONS PRESENTED

1. Did the Court err in denying defendants' motion to suppress all evidence seized in defendant VALVERDE'S apartment save the advanced funds specified in the search warrant?

2. Did the Court err in prohibiting the defense from cross-examining EUGENE PIPER with regard to a lewd full color photographic essay which appeared in "Viva" magazine?

3. Did the Court commit reversible error and deny defendants a fair trial by failing to instruct the jury of the purpose which it could utilize impeaching evidence indicating that Government witnesses were confessed criminals?

4. Did the Government prosecutor's summation exceed proper bounds and deny the defendant a fair trial?

5. Was it error to permit EUGENE PIPER to testify to a post-arrest conversation with defendant VALVERDE'S co-defendant without rendering a limiting cautionary instruction to the jury that the statements were admissible only against GLASSER?

6. Did the Court err in denying defendants' motion to suppress evidence based upon agent HALL'S pre-arrest physical intrusion into the curtilage of defendant VALVERDE'S apartment?

7. Did the presence and active participation of Assistant United States Attorney Fortuin in the search of appellant's apartment in violation of 18 U.S.C. 3105 require the suppression of the evidence seized?

POINT I

THE COURT ERRED IN DENYING DEFENDANTS' MOTION TO SUPPRESS ALL EVIDENCE SEIZED IN DEFENDANT VALVERDE'S APARTMENT SAVE FOR THE ADVANCE FUNDS SPECIFIED IN THE SEARCH WARRANT.

The Fourth Amendment protects the rights of individuals to be free of unreasonable searches and seizures. It likewise requires that:

> "No warrants shall issue, but upon probable cause...and particularly describing the persons or things to be seized."

The goal of this requirement of strict particularity was to protect individuals against hated general searches which were executed by whim or caprice by British agents prior to the American revolution (see: Boyd v. U.S., 116 U.S. 616, 624, 6 S.Ct. 524, 529; Marron v. U.S., 275 U.S. 192, 195, 48 S.Ct. 74, 75 [1927]; Stanford v. Texas, 379 U.S. 476, 481-485, 85 S.Ct. 506, 509 [1965]).

In scrutinizing the language of a particular search warrant against this constitutional background, the Courts have held:

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is taken nothing is left to the discretion of the officer executing the warrant."

(Marron v. U.S., supra, 48 S.Ct. 76; see also: Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038 [1971]; U.S. v. Dzialak, 441 F.2d 212, 216-217 [2 Cir. 1971] cert. den. 404 U.S. 883).

The February 14, 1975 search warrant which Magistrate Jacobs approved specifically permitted a search of apartment 5-D to be limited to:

> "[M]oney which is Official Advance Funds of the United States Government or the proceeds of a narcotics transactions [sic] and narcotic drug controlled substances."

Indeed, in the supporting affidavit of Drug Enforcement Agent Jeffrey Hall, he stated that a warrant was sought to uncover money and narcotic drug controlled substances.

The clear import of the warrant application and the language of the warrant itself limited the scope of the agents' search to one seeking the $10,000 in pre-identified "buy money" which had previously been transferred from KREIMAN to PIPER and ultimately to apartment 5-D.

While a good deal of the testimony both at the motion to suppress and the post-trial hearing focused upon the defendants' claim that the agents conducted a pre-warrant search, the Court's finding that the agents were credible and the Government's stipulation not to utilize or admit into evidence two seized pistols still does not obviate the defendants' claim that to the extent that the three hour search went well beyond a search for the $10,000 in "advance" funds that the agents intentionally exceeded the scope of the warrant to such a degree, that suppression of all items save the seized $10,000 was mandated.

As outlined in the return on the search warrant, agents HALL and GRAY seized:

> "[3] black suitcases containing miscellaneous papers each bearing LaGuardia Airport claim tickets.
> [1] alligator briefcase containing passports [two], two additional passports.
> [1] black suitcase containing miscellaneous papers found in area of bedroom bookshelves.
> [2] guns, 1 box ammo. 380 caliber.
> [1] book entitled "The Founding Father containing $3,090.00 in a manila envelope.
> [1] French dictionary containing $2,900.00 in a grey envelope.
> [1] Book entitled Glory and the Lightning containing $10,000.00 in a manila envelope.
> All items seized within Master Bedroom."

In view of the clear suppression hearing testimony that the bookcase became an initial focus of the search and the advance funds were clearly found shortly after the search commenced, we contend that the agents license to search apartment 5-D was of limited duration. It existed for only so long as the advance funds remained undiscoverable; at the point that the funds were discovered, the right to search terminated.

As the testimony at the hearing on the motion to suppress made clear, the $10,000 was found early on during the search. Clearly the agents were under an affirmative obligation to desist from searching further at the time these funds were discovered. Clearly a further search, wider in scope or in point of time, exceeded the specific terms of the warrant and tainted the seizure of all seized items save the $10,000.

Judge Griesa held, however, that the seizure of all items other than the advanced funds was justified under the "plain view" exception to the warrant requirement (see pp. 32-33 of Judge Griesa's ruling on the motion to suppress). While "plain view", if applicable, might serve as a basis for excusing the agents' failure to seek an amendment of the warrant, we contend that the continued search and ultimate seizure of items other than the previously discussed $10,000 does not fall within the plain view exception.

The keystone for warrantless seizures of items in plain view, beyond a threshhold showing of inadvertence, is that the article was acknowledged to be of an incriminating character at the time of the seizure (see: Coolidge v. New Hampshire, supra, 91 S.Ct. 2037; U.S. v. Canestri, 518 F.2d 269, 274 [2 Cir. 1975]). The problem, then, is how the Government can justify the seizure of such non-contraband and non-

incriminatory items as black suitcases, papers, books and records, passports, $3,090 in "unmarked" bills, the formula, etc. At the time of this seizure, these items were clearly non-incriminatory and were clearly different in both nature and kind from items constituting contraband per se (such as fire arms or drugs) and, hence, their seizure clearly exceeded the scope of the warrant.

The seizure at bar is also vastly different from the search by warrant which this Court sanctioned in U.S. v. Scharfman, 448 F.2d 1352 [2 Cir. 1971], cert. den. 405 U.S. 919 [1972].

In Scharfman (supra), the warrant authorized the seizure of specified stolen objects as well as "books, records and instrumentalities" utilized in conjunction with the criminal enterprise. In the case at bar, the Magistrate did not approve the seizure of such items. To this extent, Scharfman's claim that the searching agents violated his Fourth Amendment rights by seizing certain index cards and a consignment memorandum book, is on an entirely different footing.

If the warrant requirement is to continue as a buffer between the Government and private citizens and their private possessions, courts will have to do better than wink at searches which exceed the scope of authorizing warrants, and attempt to justify such conduct under broad generalizations like "plain view". If every execution of a search warrant can be conducted as broadly as agents HALL and GRAY have read this search warrant, then any search warrant, regardless of how narrow the Magistrate fashions it, will ultimately sanction total and general

searches of the subject locale. We do not believe that Magistrate Jacobs ever envisioned a search or ultimate seizure as sweeping as was conducted at bar.

The penalty for such an excess must be the suppression of every item save the advanced funds. To hold otherwise will not merely stretch the "plain view" exception beyond its well understood meaning, but will delegate to searching agents the power to decide the limits of warrant approved searches. A free society cannot allow such an improper delegation.

POINT II

THE COURT ERRED IN PROHIBITING THE DEFENSE FROM ATTEMPTING TO IMPEACH EUGENE PIPER'S CREDIBILITY BY ALLUDING TO OR CONFRONTING HIM WITH A LEWD PHOTOGRAPHIC ESSAY IN WHICH HE WAS THE FEATURED SUBJECT.

In an effort to impeach the Government's key witness against them, the defendants sought to impeach EUGENE PIPER'S credibility by resort to a photographic, color essay entitled "Holli and Gene" which appeared in the October 1974 issue of "Viva" magazine and which portrayed and documented not merely PIPER'S anti-social craving to pose lewdly* for a mass media photographer, as well as a well-documented facility for engaging in fantasies (see "Viva" magazine, p. 53). Judge Griesa declined to permit defense counsel to utilize this exhibit because the Court felt that it was unfair to expose a Government witness to such an attack and cited Rule 403 of the Federal Rules of Evidence as authority for declining to permit such cross-examination [222-223].

To the extent that the fact finders were denied knowledge of this devastating aspect of PIPER'S activities, it was denied an important input in assessing his credibility. That PIPER chose to pose and participate in the photographic essay in question is not merely a personal question or morals, rather, PIPER'S conduct was criminal in nature** and the jury certainly had a right to know of it.

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*The exposure of PIPER'S genitalia and his active engagement in sexual intercourse.

**See: New York Penal Law, Section 245.00, 245.11.

It is hornbook law that a witness in a criminal case places his credibility in issue such that he may be cross-examined concerning any criminal, immoral or vicious conduct that he may have engaged in (see: Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 1110-1111 [1974]). Indeed, the right to full and fair cross-examination is a vital function of the right of confrontation, such that a failure to accord same arises to a constitutional deprivation.

As the Supreme Court made clear in the Davis holding:

> "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harrassing interrogation, the cross examiner is not only permitted to delve...but the cross examiner has traditionally been allowed to impeach, ie., discredit, the witness."
> (Davis v. Alaska, supra, 94 S.Ct. 1110)

Rule 403* of the Federal Rules of Evidence exists as a codification of the traditional discretion vested in the trial bench, to properly and constitutionally shape and "move" the trial. While the goals of Rule 403 are certainly laudible, a trial judge who purports to follow Rule 403 as a "guiding star" must take care to insure that the defense is not being deprived of an important constitutional right in the guise that the evidentiary issue is merely one of nisi prius discretion.

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*Rule 403 states:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Thus, this Court in U.S. v. Dwyer, ___F.2d___ [2 Cir. 7/26/76, slip opn. 5091] reversed appellant Dwyer's conviction on the basis that Judge Duffy erred in applying Rule 403 to the exclusion of affirmative defense evidence tending to show the existence of a mental disease or defect sufficient to undermine the Government's claim that Dwyer acted with the requisite mens rea. As Judge Van Graafeiland took care to remind the trial bench:

> "Although Rule 403 has placed great discretion in the trial judge, discretion does not mean immunity from accountability."
> (U.S. v. Dwyer, supra, p. 5097)

Similarly, in U.S. v. Robinson, ___F.2d___ [2 Cir. 11/1/76, slip opn. 5913], a panel of this Court reversed Robinson's bank robbery conviction on the grounds that the trial judge erroneously permitted the Government to admit into evidence a hand gun, seized ten weeks after the crime. This Court felt that the admission into evidence of an item so tenuously related to the criminal conduct in issue (see: U.S. v. Robinson, supra, 5919-5920), was unduly prejudicial.

Most recently in U.S. v. Amrep Corp, et. al., ___F.2d___ [2 Cir. 11/1/76, slip opn. 379], a divided panel of this Court once again reviewed a trial judge's application of Rule 403 and held, in this instance in the context of an interlocutory appeal by the Government complaining of certain pre-trial evidentiary rulings by Judge Metzner, that the trial court erred in failing to allow the use of certain proferred testimony.

A reading of Rule 403, an understanding of this early trilogy of cases which have emerged in this Circuit, and a respect for a defendant's constitutional right to fully present evidence, make clear that if the

trial court should consider excluding evidence, it should be done in such a way as not to infringe upon the defendants' right to a fair trial. In the case at bar, the photographic essay was certainly relevant within the terms and meaning of Rule 401* of the Federal Rules of Evidence as a piece of vital impeaching evidence undermining the credibility of the Government's key witness, EUGENE PIPER.

Once a threshhold showing has been established by a defendant offerror of evidence, only the most succinct and compelling of reasons should allow the Government to obtain a "protective order" excluding the fact finders from hearing the evidence. Indeed, it well appears that Rule 403 is more a defendant protecting rule, providing a codified basis to protect the individual on trial against the vast investigative resources of the Government. It is, thus, somewhat incongruous that PIPER, a Government witness, should be the beneficiary of a trial judge's protective order such that an explicit public display, appearing in a magazine of nationwide circulation, could not be shown or made known to the jury because of its unfairness to PIPER.

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*Rule 401 states:

> ""Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action, more probable or less probable than it would be without the evidence."

Whatever effect the use and display of the "Viva" essay would have had on the jury in assessing PIPER'S credibility cannot be known. What is known is that as a commercial public display, PIPER had no reasonable expectation that these photographs were not to be viewed by the public at large. Rather, it appears the wider the magazine's circulation, the greater future commercial success for PIPER. Clearly, neither PIPER or the Government needed, nor more importantly was entitled, to protection of this kind.

Unless Rule 403 is to exist to properly expedite trials and protect the individual rather than the State, Judge Griesa's ruling must be overturned and a new trial ordered.

POINT III

THE COURT'S FAILURE TO APPRISE THE JURORS OF THE PURPOSE TO WHICH IT COULD UTILIZE IMPEACHMENT EVIDENCE INDICATING THAT GOVERNMENT WITNESSES WERE CONFESSED CRIMINALS, SERIOUSLY DISTORTED THE FACT FINDING PROCESS AND DENIED THE DEFENDANTS A FAIR TRIAL.

Although specifically requested to do so by defense counsel [944], Judge Griesa declined to instruct the jury as to what effect and weight it was empowered to give to the evidence in the record demonstrating that Government witnesses KREIMAN and PIPER were convicted federal felons. It is, of course, hornbook law that a conviction for a crime may be considered by the fact finders in determining a given witness' credibility and, hence, to determine how much weight, if any, to accord to that witness' testimony (Devitt and Blackmar, "Federal Jury Practice and Instructions", Sec. 12.06 [2 Ed. 1970]).

By not advising the jury of the evidentiary effect which the law gives to conduct of this nature, the trial judge allowed the jury to enter its deliberations unaware and unsure of a vital aspect of the defendants' case, ie., that the Government's witnesses were criminals who were unworthy of belief and upon whose testimony guilt beyond a reasonable doubt could not be established. We believe that this failure involves a fundamental defect in the trial of a criminal case such that a reversal and remand for a new trial is required (see: U.S. v. House, 471 F.2d 886, 888 [1 Cir. 1973]; U.S. v. Jansen, 475 F.2d 312, 319 [7 Cir. 1973], cert. den. 414 U.S. 826).

POINT IV

MULTIPLE IMPROPRIETIES IN ASSISTANT UNITED STATES ATTORNEY SEARS' SUMMATION DENIED DEFENDANTS A FAIR TRIAL.

It is a well understood precept that closing arguments in a trial should be directed toward the four corners of the evidence in the record and the inferences which the respective parties believe should be drawn from the evidence. Of particular concern, in this connection, is the conduct of Government attorneys, for as the Supreme Court has held:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

(See: Berger v. U.S., 295 U.S. 78, 88, 55 S.Ct. 629, 633 [1935]).

In this connection, this Court has held that it is patently improper for the Government prosecutor to interject the prestige of his office into the fact finding process by expressing his personal opinions concerning contested facts at the trial (see: U.S. v. Drummond, 481 F.2d 62 [2 Cir. 1973]; U.S. v. White, 486 F.2d 204, 204 [2 Cir. 1973]; see: Code of Professional Responsibility, EC 7-24), or to comment upon a defendant's reliance upon his constitutional right not to introduce affirmative evidence to negate a portion of the Government's proof, and not to have this failure commented upon (see: Griffin v. California, 380 U.S. 609; U.S. v. Burse, 531 F.2d 1151, 1154 [2 Cir. 1976]) or to make comments solely to emotionally inflame the jury against the defendants (Berger v. U.S., supra, People v. Ashwall, 39 N.Y.2d 105, 383 N.Y.S.2d 204 [1976]). Measured against these standards, we contend that Assistant United States Attorney Sears' summation was patently improper and denied defendant VALVERDE a fair trial.

At page 856 of the trial transcript and later still at pages 905 and 906, the prosecutor improperly commented on the failure of defendants to offer proof regarding the presence of $10,000 in advance funds in a bookcase in defendant VALVERDE'S bedroom as to rebut the Government's claim that a seized formula was utilized for cocaine distribution and not the wine business. While the prosecutor had an absolute right to argue the inferences favorable to the Government, he was interdicted on constitutional grounds from adversely commenting upon the defendants'

absence of proof.

Later* the prosecutor interjected the prestige of the United States Attorney's office into the fact finding process by becoming an unsworn Government witness by flatly asserting that he did not believe that the books, from which money had been seized, came from any place other than the bookcase. Such flat declaratory assertions by a Government attorney constitute improper "input" into the fact finding process because such assertions escape the crucible of cross-examinations and are enhanced by the inherent status of the declarant.

Lastly, it was also improper for the prosecutor to refer to the defendants as "high rollers" and "large dealers on an international scale".** Comments of this nature were not merely unsupported by the trial record, but were introduced solely to inflame and emotionally excite the jury against the defendants by improperly suggesting a level of criminal activity beyond the proven facts in the case. Comments of this kind do not merely thwart the rational workings of our fragile lay jury system, but they deny a defendant a fair verdict arrived at solely upon the evidence in the record.

The only effective tool to curb excesses of this nature, is to reverse the judgment appealed from and remand for a new trial.

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*At page 856a.

**At page 908.

POINT V

IT WAS ERROR TO ALLOW PIPER TO TESTIFY CONCERNING A CONVERSATION WITH DEFENDANT GLASSER.

On the day following the defendants' arrest, defendant GLASSER entered into a conversation with EUGENE PIPER, in one of the cell blocks at the West Street Detention Center, wherein he allegedly suggested to PIPER that he [PIPER] carry the brunt of the load by fabricating a story minimizing GLASSER and VALVERDE'S criminal exposure [300-301]. Although defendant VALVERDE objected to the admissibility of these conversations as against himself, Judge Griesa declined to limit the conversation merely to the declarant, GLASSER [302]. This, we contend, was error.

The post-arrest conversation between GLASSER and PIPER was certainly relevant insofar as it tended to demonstrate GLASSER'S consciousness of guilt. The admissibility of this statement by GLASSER even though on admission and made in VALVERDE'S presence, is not, however, so certain.

Clearly as to VALVERDE, the statement was hearsay. Because it was allegedly uttered after the conspiracy in question terminated, the otherwise hearsay statement did not qualify to be admitted, at least against the non-declaring co-defendant, under the co-conspirator exception to the hearsay rule.

Rather, it appears that Judge Griesa fell into the same trap that Judge Weinstein did in U.S. v. Flecha, 539 F.2d 874, 876-877 [2 Cir. 1976], wherein the Court assumed that merely because a statement uttered

in the presence of another accused and not rebutted or denounced, that this ipso facto renders it an admission by silence.

The fact is that VALVERDE well knew that PIPER was a cooperating Government agent. In this connection, his silence in the face of a co-defendant's declaration, uttered following the termination of the conspiracy, was hearsay and if a joint trial was to be utilized, VALVERDE was entitled to a strong limiting instruction indicating that if the jury believed that the conversation actually occurred, then it could only be given weight in assessing the evidence against GLASSER and not VALVERDE.

In this connection, whether considered in isolation or in conjunction with the other claims of error, the admission of GLASSER'S statement, without limiting instructions, did not constitute harmless error (cf. Chapman v. California, 386 U.S. 18; Harrington v. California, 393 U.S. 250; Milton v. Wainright, 407 U.S. 371).

POINT VI

AGENT HALL'S INVASION OF THE CURTILAGE OF VALVERDE'S APARTMENT AND PHYSICAL LISTENING TO THE PRIVATE CONVERSATIONS THEREIN VIOLATED VALVERDE'S FOURTH AMENDMENT RIGHTS.

Subsequent to EUGENE PIPER'S receipt of the $10,000 in advanced funds from KREIMAN at the latter's apartment, PIPER returned to VALVERDE'S Manhattan apartment, followed by agents GRAY and HALL. The latter agent then went "door to door" listening to hear PIPER'S voice. After several unsuccessful attempts, agent HALL placed himself into the doorway proper of VALVERDE'S apartment 5-D, placed his ear physically against the apartment door, and eavesdropped upon the conversation in the apartment between PIPER and defendants GLASSER and VALVERDE. It was the hearing of the private conversations between the trio which ultimately enabled HALL to arrest PIPER, obtain his services as a Government agent, and provide a basis for the search warrant application.

Although trial counsel did move to controvert the search warrant and suppress the evidence seized in VALVERDE'S apartment on Fourth Amendment grounds, this particular Fourth Amendment violation was not raised until the close of the Government's case [729-731]. The Court declined to strike the testimony and suppress the evidence tainted by this activity because he felt that the objection had been waived. We disagree.

Courts fundamentally recognize that every reasonable presumption must be engaged in against a finding that a criminally accused has waived a constitutionally protected right (Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 1023 [1938]). In the case at bar, the defendants timely

moved to suppress the challenged evidence, but did not proffer the challenge based upon physical intrusion* until the close of the Government's direct case.

There is no question but that motions to suppress evidence should be made as promptly as possible (see: Federal Rules of Criminal Procedure, Rules 41[f] and 12). Nonetheless, in cases such as the one at bar, where the facts upon which suppression is based are uncontested, the trial court should consider the motion on the merits (see: Rule 12[f] of the Federal Rules of Criminal Procedure).

This is not a case, such as in U.S. v. Sisca, 503 F.2d 1337, 1346-1349 [2 Cir. 1974, cert. den. 419 U.S. 1008]. where the district court judge explicitly directed that motions seeking to controvert eavesdrop orders and suppress electronically intercepted conversations be filed prior to trial. In Sisca, it was an intentional and unjustifiable failure by defense counsel to raise their objections to the propriety of the wiretapping pre-trial which led this Court to affirm Judge Bryan's finding that the defendants intentionally waived their objections to the electronic surveillance. In the case at bar, the defendants sought timely suppression, but merely failed to include the claim of physical intrusion as an alternate basis for suppression.

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*Agent HALL'S presence in the curtilage of the apartment, and physical eavesdropping of the private conversations therein clearly violated the Fourth Amendment rights of all the declarants (see: Katz v. U.S., 389 U.S. 347, 88 S.Ct. 507 [1967]; Fixel v. Wainright, 492 F.2d 480, 483 [5 Cir. 1974]; Wattenburg v. U.S., 388 F.2d 853, 857-858 [9 Cir. 1968]).

A further distinction between Sisca (supra) and the case at bar is that Sisca's claim of suppression necessarily required the holding of extensive hearings on the mixed question of minimization (see: 18 U.S.C. 2518[5]). In the case at bar, a hearing was not required to resolve the belatedly asserted claim, and merely required the striking of certain testimony.

Surely if Judge Griesa was persuaded of the impropriety of agent HALL'S physical surveillance, he had but to offer the defendants the option of a motion to strike* with appropriate cautionary instructions* or a face a waiver of the constitutional objection. In this posture, we believe Judge Griesa erred in not considering whether there was sufficient good cause within the meaning of Rule 12[f] to permit a judicial posture other than waiver.

Accordingly, the judgment should be remanded for a reconsideration on the merits of this objection and ultimately a new trial.

POINT VII

THE PRESENCE AND ACTIVE PARTICIPATION OF ASSISTANT UNITED STATES ATTORNEY FORTUIN DURING THE EXECUTION OF THE SEARCH WARRANT VIOLATED 18 U.S.C. 3105 AND REQUIRES SUPPRESSION OF THE SEIZED EVIDENCE.

It is undisputed that Assistant United States Attorney Thomas Fortuin accompanied agent HALL to defendant VALVERDE'S apartment and actively participated in the search of the bedroom which yielded the articles listed on the return of the search warrant and which were introduced into evidence at trial. The problem which arises by virtue of the prosecutor's participation is that he acted contrary to the

clear mandate of 18 U.S.C. 3105*. Clearly, Fortuin's participation was not "required" within the meaning of the statute, but, rather, he was invited to participate for reasons other than the need to execute the search warrant. It is likewise clear that an Assistant United States Attorney is not authorized by law to serve a search warrant (see: Rule 41[c] and [h] of the Federal Rules of Criminal Procedure).

The cases construing 18 U.S.C. 3105 and its predecessor make clear that the statute must be strictly construed, and that participation by an individual not recognized in the statute invalidates the search warrant (see: Leonard v. U.S., 6 F.2d 353, 355 [1 Cir. 1925]; Perry v. U.S., 14 F.2d 88, 89 [9 Cir. 1926]; U.S. v. Smith, 16 F.2d 788 [S.D. Fla. 1927], but cf. U.S. v. Cox, 462 F.2d 1293, 1306 [8 Cir. 1972], cert. den. 417 U.S. 918).

Unless the Government is able to establish a more substantial basis than has been heretofore demonstrated, Judge Griesa's ruling declining to controvert the search warrant based upon the active participation of a "stranger" to the search should be overturned, and the evidence seized thereunder suppressed.

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*18 U.S.C. 3105 provides:

> "A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution."

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE CASE SHOULD BE REMANDED FOR A NEW TRIAL.

Respectfully submitted,

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